

Legal Update: Michigan's Statutory Sentencing Guidelines

January 31, 2007

Faculty:
Phoenix Hummel
Michigan Judicial Institute
hummelp@courts.mi.gov

Overview

The legislative/statutory sentencing guidelines were enacted for most felony offenses committed on or after January 1, 1999. The statutory guidelines mirrored in large part the judicial sentencing guidelines first issued in 1983. The judicial sentencing guidelines remain in effect for offenses committed before January 1, 1999. In general, the objective of both the judicial and statutory sentencing guidelines is to eliminate disparity in sentencing by standardizing the sentences imposed on offenders with a similar criminal history who commit similar crimes under similar circumstances.

The statutory sentencing guidelines apply to offenses (mostly felonies, but some misdemeanors are included—MCL 750.414, for example) committed on or after January 1, 1999, that are expressly listed in MCL 777.11 to 777.19, and that are subject to an indeterminate sentence. The guidelines do not apply to offenses for which the prescribed penalty is a mandatory determinate sentence or a mandatory sentence of life imprisonment. Subject to additional statutory conditions or requirements, the statutory guidelines do apply to habitual offenders, repeat drug offenders, specific controlled substance violations occurring after March 1, 2003, and probation violations resulting in incarceration. The statutory guidelines also apply to certain attempted felony offenses.

The guidelines operate by scoring all prior record variables (PRVs) for each offense and scoring only the offense variables (OVs) appropriate to a certain offense. These PRVs and OVs “measure” the severity of an offender’s criminal history, as well as the severity of the offense committed, by assigning numeric values to specific characteristics of the offender and offense.

Crime Groups

All offenses subject to the statutory guidelines fall into one of six crime groups. The offense category, or crime group, to which an offense belongs will determine which offense variables must be scored for that offense. The six crime groups are:

- “Person” – crimes against a person
- “Property” – crimes against property
- “CS” – crimes involving a controlled substance
- “Pub ord” – crimes against public order
- “Pub trst” – crimes against the public trust
- “Pub saf” – crimes against public safety

Crime Classes

Within each crime group, all offenses to which the guidelines apply are further categorized into classes. Crime classes represent the seriousness of a particular offense and are designated by the letters A through H in decreasing order of severity. Second-degree murder is designated as M2. An offense's crime class determines which sentencing grid is used to determine the offender's recommended minimum sentence.

Example: Statutory List of Guidelines Offenses—MCL 777.16x

MCL	Category	Class	Description	Stat Max
750.478a(2)	Pub ord	H	Unauthorized process to obstruct a public officer or employee	2
750.478a(3)	Pub ord	G	Unauthorized process to obstruct a public officer or employee — subsequent offense	4
750.479(2)	Person	G	Assaulting or obstructing certain officials	2
750.479(3)	Person	G	Assaulting or obstructing certain officials causing injury	4
750.479(4)	Person	D	Assaulting or obstructing certain officials causing serious impairment	10
750.479(5)	Person	B	Assaulting or obstructing certain officials causing death	20
750.479a(2)	Pub saf	G	Fleeing and eluding — fourth degree	2
750.479a(3)	Pub saf	E	Fleeing and eluding — third degree	5

Prior Record Variables

There are 7 prior record variables and all 7 of them are scored for each offense subject to the statutory guidelines. Each PRV measures a specific characteristic of an offender's criminal history and assigns a number to each characteristic — a certain numeric value corresponds to the number of an offender's prior high severity felony convictions, for example. An individual prior record variable is scored by determining which of the statements apply to the offense being scored and of those applicable statements, using the one with the highest number of points.

The total number of points scored for an offender's 7 PRVs is the offender's PRV level, which is used to determine an offender's recommended minimum sentence in the sentencing grid corresponding to the sentencing offense's crime class.

Offense Variables

Not all 20 offense variables are scored for each offense subject to the sentencing guidelines. Specific OVs are scored according to the crime group to which a particular offense belongs. The offense variables scored for offenses in each of the 6 crime groups are specified in MCL 777.22(1)-(5).

An individual offense variable is scored by determining which of the statements apply to the offense being scored and of those applicable statements, using the one with the highest number of points. The total number of points scored for all OVs appropriate to the offense is the offender's OV level, represented by the vertical axis of a sentencing grid.

Attempts

The guidelines also apply to attempted offenses if the offense attempted was a felony offense in classes A—G. The guidelines do not apply to attempted class H felonies. The crime group assigned to the felony offense attempted applies to the attempted offense itself for purposes of scoring the guidelines. The crime class for attempted offenses depends on the crime class of the offense attempted. Attempts to commit a crime in class A, B, C, or D is classified as a class E offense. Attempts to commit a crime in class E, F, or G is a class H offense. See MCL 777.19(1)-(3).

Offenses predicated on underlying felonies – “SPEC” and “Variable”

The offenses listed in MCL 777.18 are offenses predicated on an underlying felony, and special scoring instructions apply to those offenses. The offenses listed in MCL 777.18 are those felony offenses for which the statutory maximum penalty is “variable.” “Variable” indicates that the term of imprisonment for the violations listed there is not limited to a specific number of years (as are the individual violations listed in MCL 777.11 to 777.17g) because the offenses in MCL 777.18 refer to a variety of underlying felonies to which different statutory maximum penalties apply. In addition, some provisions of the felony offenses listed in MCL 777.18 provide for mandatory minimums or double or triple times the maximum terms of imprisonment authorized in the statutory language governing the underlying felonies themselves.

Offenses in MCL 777.18 include controlled substance violations involving minors or near school property, subsequent controlled substance offenses, recruiting or inducing a minor to commit a controlled substance felony, conspiracy, recruiting or inducing a minor to commit a felony, voluntarily allowing a prisoner to escape, felony offenses committed in weapon-free school zones, and larceny of rationed goods.

Each offense listed in MCL 777.18 is assigned a crime group designation that may differ from the crime group designated for the offense when it is not the basis for an MCL 777.18 conviction. Effective January 9, 2007, 2006 PA 655 amended the scoring instructions for MCL 777.18 offenses. As amended, MCL 777.21(4) requires that the OV's appropriate to the underlying offense's crime group be scored *and any additional OV's* indicated by the crime group assigned under MCL 777.18.

The crime class of the offenses listed in MCL 777.18 is “SPEC” because the crime class varies according to the nature of the underlying felony. The amended statute creates a “default” class G for those situations where the offense on which the MCL 777.18 is based is not a felony offense. According to MCL 777.21(4), the crime class of an MCL 777.18 offense is the same as the underlying felony's class when there is only one underlying felony. If there are multiple underlying felonies, the crime class of the MCL 777.18 offense is the same as the felony with the highest crime class. If none of the underlying offenses are felonies, the crime class of the MCL 777.18 offense is G.

Example: “SPEC” and “Variable” Offenses—MCL 777.18

MCL	Category	Description	Stat Max
333.7410	CS	Controlled substance offense or offense involving GBL on or near school property	Variable
333.7413(2)or(3)	Pub trst	Subsequent controlled substance violations	Variable
333.7416(1)(a)	CS	Recruiting or inducing a minor to commit a controlled substance felony	Variable
750.157a(a)	Pub saf	Conspiracy	Variable
750.157c	Person	Inducing minor to commit a felony	Variable
750.188	Pub ord	Voluntarily suffering prisoner to escape	Variable
750.237a	Pub saf	Felony committed in a weapon-free school zone	Variable
750.367a	Property	Larceny of rationed goods	Variable

Example: Specific Underlying Felonies—MCL 777.13m (in part)

MCL	Category	Class	Description	Stat Max
333.7401(2)(c)	CS	F	Delivery or manufacture of schedule 4 controlled substance	4
333.7401(2)(d)(i)	CS	C	Delivery or manufacture of 45 or more kilograms of marijuana	15
333.7401(2)(d)(ii)	CS	D	Delivery or manufacture of 5 or more but less than 45 kilograms of marijuana	7
333.7401(2)(d)(iii)	CS	F	Delivery or manufacture of less than 5 kilograms or 20 plants of marijuana	4
333.7401(2)(e)	CS	G	Delivery or manufacture of schedule 5 controlled substance	2
333.7401(2)(f)	CS	D	Delivery or manufacture of an official or counterfeit prescription form	20
333.7401(2)(g)	CS	D	Delivery or manufacture of prescription or counterfeit form (other than official)	7

Example: Specific Felonies Underlying an MCL 777.18 Offense

	MCL	Category	Class	Description	Stat Max
1st	333.7401(2)(d)(ii)	CS	D	Delivery or manufacture of 5 or more but less than 45 kilograms of marijuana	7
2nd	333.7401(2)(e)	CS	G	Delivery or manufacture of schedule 5 controlled substance	2
	MCL	Category		Description	Stat Max
Sentencing Offense	333.7413(2)or(3)	Pub trst		Subsequent controlled substance violations	Variable

Example: Scoring “SPEC” and “Variable” Offenses

An offender is convicted under MCL 333.7413(2) for a subsequent controlled substance violation, and the underlying offense is MCL 333.7401(2)(e), manufacture or delivery of a schedule 5 controlled substance. The underlying felony (MCL 333.7401(2)(e)) is designated as a class G offense in the CS crime group. The statutory max for the underlying felony is 2 years.

MCL 333.7413(2), the felony statute under which the offender was convicted as listed in MCL 777.18, is designated as a crime against public trust. As amended by 2006 PA 655, MCL 777.21(4) requires scoring the OV's appropriate to the underlying felony be scored *and* any OV's appropriate to the crime group designated under MCL 777.18.

In the same example, the offender's recommended minimum sentence range is determined by locating the cell at which the offender's OV and PRV levels intersect on the sentencing grid for class G felonies because the underlying offense—manufacture/delivery of a schedule 5 substance—is a class G felony, and in our example, it is the only underlying offense. According to MCL 333.7413(2), an offender convicted of a subsequent controlled substance conviction may not receive a penalty greater than twice the statutory maximum permitted for conviction of the underlying felony (for MCL 333.7401(2)(e), 2 years).

Example: Determining the Maximum Penalty for a “SPEC/Variable” Offense

Find the statutory max for the underlying offense—MCL 333.7401(2)(e)

According to MCL 333.7401(2)(e), a person who manufactures/delivers/possesses with intent “[a] substance classified in schedule 5 is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.”

Calculate penalty under MCL 777.18

According to MCL 333.7413(2), a person convicted of a second or subsequent controlled substance offense not addressed by subsection (1) or (3) “may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both.”

Result

The statutory maximum penalty for a violation of MCL 333.7413(2) based on the underlying felony in MCL 333.7401(2)(e) is not more than 4 years of imprisonment (or a fine of not more than \$4,000.00, or both).

Sentencing Grids

An offense's crime class determines which sentencing grid applies. The crime class for each offense is found with the offense as it is listed in MCL 777.11 to 777.19. The 9 sentencing grids (one each for crimes in classes A through H and one for second-degree murder) are found in MCL 777.61 to 777.69.

An offender's recommended minimum sentence is determined by the offender's PRV and OV levels. An offender's PRV level is designated by capital letters from A to F according to the offender's PRV point total. It is represented by the horizontal axis on a grid. PRV level A represents the column with the least number of points and PRV level F represents the column with the highest number of points. The severity of penalty increases with an offender's transit from PRV level A up to PRV level F. The point values corresponding with PRV levels A through F are the same for all nine sentencing grids so that an offender's criminal history is equally weighted no matter what the severity of the sentencing offense.

Depending on the specific sentencing grid, an offender's OV level will be designated in roman numerals from I to VI. The OV level's numeric designation increases as the offender's OV point total increases so that the severity of the corresponding penalty increases as does the offender's OV level.

The sentencing grids printed in Appendix B of Monograph 8 and beginning on page 87 of the Sentencing Guidelines Manual and as shown in the examples here, are comprehensive sentencing grids that combine the minimum sentences recommended under the guidelines for *all* offenders— both first-time *and* habitual. For first-time offenders, or offenders not otherwise being sentenced as habitual offenders, the appropriate upper limit of a recommended minimum range is the number corresponding to the empty "offender status" box on the sentencing grid.

Sentencing Grid for Class C Offenses—MCL 777.64

OV Level	PRV Level												Offender Status
	A 0 Points		B 1-9 Points		C 10-24 Points		D 25-49 Points		E 50-74 Points		F 75+ Points		
I 0-9 Points	0	11*	0	17*	10	19	12	24	19	38	29	57	
		13*		21		23		30		47		71	HO2
		16*		25		28		36		57		85	HO3
		22		34		38		48		76		114	HO4
II 10-24 Points	0	17*	5	17*	12	24	19	38	29	57	36	71	
		21		21		30		47		71		88	HO2
		25		25		36		57		85		106	HO3
		34		34		48		76		114		142	HO4
III 25-34 Points	10	19	12	24	19	38	29	57	36	71	43	86	
		23		30		47		71		88		107	HO2
		28		36		57		85		106		129	HO3
		38		48		76		114		142		172	HO4
IV 35-49 Points	12	24	19	38	29	57	36	71	43	86	50	100	
		30		47		71		88		107		125	HO2
		36		57		85		106		129		150	HO3
		48		76		114		142		172		200	HO4
V 50-74 Points	19	38	29	57	36	71	43	86	50	100	58	114	
		47		71		88		107		125		142	HO2
		57		85		106		129		150		171	HO3
		76		114		142		172		200		228	HO4
VI 75+ Points	29	57	36	71	43	86	50	100	58	114	62	114	
		71		88		107		125		142		142	HO2
		85		106		129		150		171		171	HO3
		114		142		172		200		228		228	HO4

Intermediate sanction cells are marked by asterisks, straddle cells are shaded, and prison cells are unmarked.

The statutory percentage increases for habitual offenders are rounded down to the nearest whole month. The cell range may be less than the maximum possible minimum sentence by a fraction of a month.

Each sentencing grid is divided into cells corresponding to the number of OV and PRV levels applicable to the crime class represented by the grid. A defendant's recommended minimum sentence range is indicated by a numerical range in the cell located at the intersection of the defendant's OV level (vertical axis) and PRV level (horizontal axis) on the sentencing grid appropriate to the crime class of the sentencing offense. The recommended minimum sentence in each cell is expressed by a range of numbers (in months) or life imprisonment (L). The maximum sentence is set by statute. The maximum statutory sentence for each offense subject to the guidelines is found in the statute describing the conduct prohibited and in the statutory lists of offenses to which the guidelines apply (MCL 777.11 to 777.19).

Habitual Offender Ranges

The appropriate minimum sentence range changes when an offender will be sentenced as a habitual offender. The 9 grids appearing in MCL 777.61 to 777.69 contain only the sentence ranges for offenders *not* being sentenced as habitual offenders; no separate grids for habitual offenders are provided. However, the recommended minimum sentence range for habitual offenders is determined by reference to the ranges reflected in the nine "basic" grids. To determine the recommended minimum sentence range for habitual offenders, the upper limit of the range for a first-time offender is increased by specific percentages, depending on whether the offender is being sentenced as a second (HO2), third (HO3), or fourth (HO4) habitual offender. For a second habitual offender, the upper limit increases by 25%. For a third habitual offender, it increases by 50%. For a fourth habitual offender, the upper limit increases by 100%. For example, in cell D-I in the sentencing grid for class C offenses, the habitual offender minimum limits are determined as follows:

12	24	
	$24 \times 0.25 = 6$ $24 + 6 = \mathbf{30}$	HO2
	$24 \times 0.50 = 12$ $24 + 12 = \mathbf{36}$	HO3
	$24 \times 1.00 = 24$ $24 + 24 = \mathbf{48}$	HO4

Cells

Specific cells in some sentencing grids are differentiated from other cells by their classification as prison cells, straddle cells, and intermediate sanction cells.

Prison cells

Prison cells are those cells for which the **lower limit** (minimum sentence recommended) exceeds 12 months of imprisonment. In the sentencing grids that appear in the Sentencing Guidelines Manual and in Monograph 8, prison cells are those cells that are unmarked, i.e., not shaded (as are straddle cells), and not asterisked (as are intermediate sanction cells). An example prison cell from C-III in the class C grid:

19	38	
	47	HO2
	57	HO3
	76	HO4

Straddle cells

Straddle cells are those cells in which the **lower limit** of the recommended range is 12 months or less and the **upper limit** of the recommended range is more than 18 months. Straddle cells appear shaded in the sentencing grids. An example straddle cell from the class C grid, cell A-III:

10	19	
	23	HO2
	28	HO3
	38	HO4

In a straddle cell, the offender can be sentenced to a prison term within the recommended range or to a jail term of up to one year.

Intermediate sanction cells

Intermediate sanction cells are those cells in which the **upper limit** recommended by the guidelines is 18 months or less. These cells are marked with an asterisk in the sentencing grids. An example intermediate sanction cell from cell A-I of the class C grid:

0	11*	
	13*	HO2
	16*	HO3
	22	HO4

An offender falling in an intermediate sanction cell cannot be sentenced to prison (except for a substantial and compelling reason to depart from the guidelines). Incarceration in county jail cannot exceed 12 months or the cell maximum, whichever is less. Additionally, an offender sentenced for attempting to commit a class H offense must be sentenced to an intermediate sanction.

Consecutive and Concurrent Sentencing

Sentences run concurrently unless otherwise indicated; consecutive sentences may not be imposed unless expressly authorized by law. Where consecutive sentencing is authorized, the statutory language will indicate whether the consecutive nature of the sentence is mandatory or discretionary.

MCL 771.14(2)(e)(i) requires that the sentencing guidelines must be calculated for each conviction for which consecutive sentencing is required or authorized. Where sentences will run concurrently, the sentencing guidelines need only be calculated for the offense with the highest crime class.

For purposes of the Code of Criminal Procedure, misdemeanors punishable by more than one year (“two-year misdemeanors”) are felonies for purposes of consecutive sentencing. However, for purposes of the Public Health Code, offenses “expressly designated” as misdemeanors retain their character as misdemeanors without regard to the length of incarceration possible for conviction of the offense. *People v Wyrick*, 474 Mich 947 (2005) (misdemeanor possession of marijuana, second offense, does *not* constitute a felony for purposes of the consecutive sentencing provision in MCL 333.7401(3)).

Offenses specified as misdemeanors in the Penal Code, even if punishable by more than one year, may not be classified as felonies for purposes of establishing the underlying felony on which, for example, the crime of felony-firearm is based. *People v Baker*, 207 Mich App 224, 225 (1994). See also *People v Williams*, 243 Mich App 333, 335 (2000) (resisting arrest is defined as a misdemeanor under the Penal Code and does not qualify as a felony for purposes of establishing that the defendant absconded on felony bond).

Prior Record Variables

Scoring Prior Record Variables

All 7 prior record variables are scored without regard to the sentencing offense’s crime class or crime group. PRVs measure an offender’s criminal history by assigning value to the number of an offender’s previous felony and misdemeanor convictions, juvenile adjudications, and to the offender’s status at the time he or she committed the sentencing offense (on probation, case pending, etc.) Each of the 7 PRVs addresses a different aspect of an offender’s history—PRVs 1 through 5 deal with various types of prior convictions and adjudications. When a PRV requires a calculation of the offender’s prior convictions, certain rules apply to which of those previous convictions qualify as a prior conviction for purposes of scoring the guidelines. To score each PRV, determine which of the statements apply to the offender and score the statement with the highest number of points. The total of all points is an offender’s PRV level – the horizontal axis of a sentencing grid.

General rules for scoring PRVs

Any conviction or adjudication scored under PRVs 1 through 5 must have been entered before the date on which the sentencing offense was committed. Even when a conviction or adjudication occurs before the commission date of the sentencing offense it cannot be counted unless it was entered before the sentencing offense was committed. That the offender's sentencing date fell after his or her commission of the sentencing offense does not matter as long as the conviction/adjudication was entered before the sentencing offense was committed. It is possible that an offender could be convicted of the prior offense on day 1, commit the sentencing offense on day 2, and the prior conviction not be entered until day 3 or after. In that case, the prior offense would not qualify as a prior conviction for purposes of scoring an offender's PRVs.

10-year gap rule

Some PRVs contain conditions unique to that specific PRV. No matter what additional parameters are required by individual prior record variables, all convictions counted as prior convictions must satisfy the 10-year gap rule. MCL 777.50(1) prohibits using a prior conviction/adjudication when scoring an offender's PRVs if 10 or more years have passed between the discharge date of the previous conviction/adjudication and the commission date of the next conviction/adjudication.

To determine whether an offender's additional previous convictions/adjudications qualify under PRVs 1 through 5, the commission date *and* the discharge date must be known. The 10-year gap is measured from the discharge date of one offense to the commission date of the next offense. If the most recent conviction/adjudication qualifies as a previous conviction, working backwards from that conviction/adjudication requires the scorer to begin with the *commission date* of the first previous conviction/adjudication, not the discharge date by which its relationship to the sentencing offense was first measured. If the offender's most recent conviction/adjudication must be counted in scoring his or her PRVs and if the offender has additional prior convictions/adjudications, determine the length of time between the *commission date* of the prior conviction/adjudication first scored and the *discharge date* of the next earlier conviction or adjudication. If the time span is less than 10 years, that conviction/adjudication must be counted. Repeat the process until a time span equal to or greater than 10 years separates the discharge date of an earlier conviction/adjudication from the commission date of the next conviction/adjudication or until no previous convictions/adjudications remain.

If a discharge date is not known, add the length of time an offender was placed on probation or the length of the offender's minimum sentence of imprisonment to the date on which the offender was convicted—not the date on which the offender was sentenced. Use that date as the discharge date for purposes of applying the 10-year gap rule to an offender's prior convictions/adjudications.

More rules for scoring PRVs

Assignment to youthful trainee status under MCL 762.11 et seq. is a conviction for purposes of scoring the PRVs. A conviction set aside under MCL 780.621—780.624 is a conviction for purposes of scoring the PRVs. Juvenile adjudications set aside under MCL 712A.18e or expunged are also convictions for purposes of scoring the PRVs. Consideration of an adult's expunged juvenile record is proper – automatic expungement is intended to eliminate social or civil stigma and economic disabilities accompanying a juvenile record, not to protect an adult offender from criminal consequences of a juvenile record. *People v Smith*, 437 Mich 293, 302-304 (1991).

PRV 1—Prior high severity felony convictions (MCL 777.51)

(as amended by 2006 PA 655, effective January 9, 2007)

- conviction for a crime in class M2, A, B, C, or D (or a felony under federal law or the law of another state corresponding to a crime in class M2, A, B, C, or D) – a foreign state is not “another state” per *People v Price*, 477 Mich 1 (2006).
- conviction for a crime punishable by a maximum term of 10 years or more that is not listed in, and does not correspond to a crime listed in, class M2, A, B, C, D, E, F, G, or H.
- entered before the commission date of the sentencing offense (and its discharge date is less than 10 years before commission date of sentencing offense).
- when previous crime was committed in another state, determine whether similar conduct would constitute a crime in class M2, A, B, C, or D in Michigan.
- more than one conviction resulting from a single judicial proceeding may be used to calculate the number of prior convictions (when an offender is sentenced for more than one offense at a single hearing).

PRV 2—Prior low severity felony convictions (MCL 777.52)

(as amended by 2006 PA 655, effective January 9, 2007)

- conviction for a crime in class E, F, G, or H (or a felony under federal law or the law of another state corresponding to a crime in class E, F, G, or H) – a foreign state is not “another state” per *People v Price*, 477 Mich 1 (2006).
- conviction for a crime punishable by a maximum term of less than 10 years that is not listed in, and does not correspond to a crime listed in, class M2, A, B, C, D, E, F, G, or H.
- entered before the commission date of the sentencing offense (and its discharge date is less than 10 years before commission date of sentencing offense).
- when previous crime was committed in another state, determine whether similar conduct would constitute a crime in class E, F, G, or H in Michigan.
- an offender’s prior conviction of joyriding, MCL 750.414, a misdemeanor punishable by not more than 2 years, was properly scored under PRV 2 because it is expressly listed in MCL 777.16u as a class H offense to which the guidelines apply. See *People v Wallace*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2003 (Docket No. 238355).

PRV 3—Prior high severity juvenile adjudications (MCL 777.53)

(as amended by 2006 PA 655, effective January 9, 2007)

- adjudication for conduct that if committed by an adult would be a crime in class M2, A, B, C, or D (or a felony under federal law or the law of another state corresponding to a crime in class M2, A, B, C, or D) – a foreign state is not “another state” per *People v Price*, 477 Mich 1 (2006).
- adjudication for conduct that if committed by an adult would be a crime punishable by a maximum term of 10 years or more that is not listed in, and does not correspond to a crime listed in, class M2, A, B, C, D, E, F, G, or H.
- order of disposition entered before the commission date of the sentencing offense (and its discharge date is less than 10 years before commission date of sentencing offense).

PRV 4—Prior low severity juvenile adjudications (MCL 777.54)

(as amended by 2006 PA 655, effective January 9, 2007)

- adjudication for conduct that if committed by an adult would be a crime in class E, F, G, or H (or a felony under federal law or the law of another state corresponding to a crime in class E, F, G, or H) – a foreign state is not “another state” per *People v Price*, 477 Mich 1 (2006).
- adjudication for conduct that if committed by an adult would be a crime punishable by a maximum term of less than 10 years that is not listed in, and does not correspond to a crime listed in, class M2, A, B, C, D, E, F, G, or H.
- order of disposition entered before the commission date of the sentencing offense (and its discharge date is less than 10 years before commission date of sentencing offense).

PRV 5—Prior misdemeanor convictions/misdemeanor juvenile adjudications (MCL 777.55)

- misdemeanor conviction under Michigan law, the law of a political subdivision of Michigan, the law of another state, or federal law.
- adjudication for conduct that if committed by an adult would be a misdemeanor as described above.
- conviction/order of disposition entered before the commission date of the sentencing offense (and its discharge date is less than 10 years before commission date of sentencing offense).

Additional requirements apply to convictions/adjudications under PRV 5

- conviction used to enhance the sentencing offense to a felony cannot be counted under PRV 5 (third OUIL, for example).
- except as noted below, only convictions/adjudications for offenses against a person or property, weapons offenses, or offenses involving controlled substances may be counted under PRV 5.
- all convictions/adjudications for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while under the influence or impaired by alcohol, a controlled substance, or a combination qualify under PRV 5.
- successful completion of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of PRV 5. See *People v James*, 267 Mich App 675 (2005).
- previous “non-OUIL alcohol-related convictions” are not offenses involving controlled substances for purposes of PRV 5. See *People v Endres*, 269 Mich App 414 (2006).
- assignment to youthful trainee status, convictions set aside under MCL 780.621—780.624, and adjudications set aside under MCL 712A.18e or expunged are prior convictions/adjudications under PRV 5.

Most misdemeanor offenses are not subject to the sentencing guidelines. Consequently, the court must determine whether prior misdemeanor convictions fit within the crime groups specified by PRV 5. Unless prior conviction is a misdemeanor version of a greater/felony offense listed in the guidelines and characterized by crime group, whether a prior conviction/adjudication falls into one of the crime groups listed in PRV 5 requires an objective analysis of the conduct involved, the harm the statute was intended to protect against, and the conduct’s relationship/similarity to crimes categorized in the guidelines.

Examples:

A prior misdemeanor conviction for obstructing an officer qualified as a crime against a person because the felony version of the offense is classified as a crime against a person and the misdemeanor offense

involved similar conduct. See MCL 777.16x and *People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328).

But see *People v Bryan*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2002 (Docket No. 227578)—misdemeanor conviction for allowing a fire to escape properly scored under PRV 5 as a crime against property even though felony offenses involving conduct similar to the offender's were classified as crimes against public safety. The court reasoned that the statute intended to protect property from fire damage. The *Bryan* Court further explained that the guidelines' crime group designations were irrelevant to the requirements of PRV 5 because the Legislature could have, but didn't, assign crime group designations to misdemeanor offenses. According to the Court: "[W]hether a prior offense is to be counted for purposes of scoring PRV 5 is dependent on the nature of the crime for which the offender was convicted or adjudicated, not on the offense category of similar felonies, which are used for scoring sentence guidelines offense variables."

See also *People v Cadwell*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2002 (Docket No. 236381). An offender's misdemeanor conviction of disorderly jostling was properly characterized as a crime against a person for purposes of PRV 5 because the crime involved unconsented touching of other persons.

PRV 6—Relationship to the criminal justice system (MCL 777.56)

- PRV 6 also applies to an offender's relationship with criminal justice systems outside the state of Michigan – the appropriate number of points should be assessed against an offender involved in another state's criminal justice system or the federal criminal justice system at the time the sentencing offense was committed.
- offender is a prisoner of DOC or is serving a sentence in jail, including escapees from jail or prison.
- offender is incarcerated and awaiting adjudication or sentencing for a conviction or probation violation.
- offender is on parole, probation, or delayed sentence status, or on bond awaiting adjudication or sentencing for a felony.
- offender is on probation or delayed sentence status, or on bond awaiting adjudication or sentencing for a misdemeanor.
- no points for offenders having no relationship to the criminal justice system..

"Delayed sentence status" includes assignment or deferral under MCL 333.7411 (certain controlled substance offenses), MCL 750.350a (some cases of parental kidnapping), MCL 762.11 (youthful trainee status), MCL 769.4a (some cases of domestic assault), MCL 600.1076 (drug treatment court), and MCL 750.430 (impaired healthcare professional).

Points can be assessed under PRV 6 for an offender's relationship to the system even if the statements in PRV 6 do not completely/accurately describe the offender's circumstances. See *People v Endres*, 269 Mich App 414 (2006), where points were properly scored against an offender who was not on probation/delayed sentence/bond but disposition of a misdemeanor offense was pending at the time he committed the sentencing offense (misdemeanor committed before sentencing offense but offender pleaded guilty to misdemeanor after commission of the sentencing offense and was sentenced for the misdemeanor before being sentenced for the sentencing offense).

See also *People v Edwards*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2002 (Docket No. 233750), where points were properly assessed against an offender who committed the sentencing offense when he escaped during his transport to jail after failing to post bond for a misdemeanor charge. The Court reasoned that the offender's failure to post bond meant that he was technically incarcerated and awaiting adjudication on the misdemeanor charge.

An offender whose bail is revoked for failing to appear at a hearing for an offense committed after the sentencing offense is still "on bond" for purposes of scoring PRV 6. *People v Lyons (After Remand)*, 222 Mich App 319, 322—323 (1997).

Points are appropriate when an offender is on bond for another offense when the sentencing offense is committed, even when the offender is acquitted of the first offense. *People v Jarvi*, 216 Mich App 161, 165 (1996).

PRV 7—Subsequent or concurrent felony convictions (MCL 777.57)

- felony convictions obtained at the same time as the sentencing offense or felony convictions obtained after the sentencing offense was committed.

Certain felony convictions cannot be counted for purposes of PRV 7:

- felony-firearm convictions.
- concurrent convictions that result in mandatory consecutive sentences.
- (beginning March 1, 2003) concurrent convictions that result in a consecutive sentence under MCL 333.7401(3).

The number of concurrent offenses for which points are assessed under PRV 7 does not include the sentencing offense. *People v Pickett*, unpublished opinion per curiam of the Court of Appeals, issued May 6, 2004 (Docket No. 246138).

PRV 7 does not apply when a mandatory consecutive sentence is imposed for an offender's parole violation. *People v Clark*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2003 (Docket No. 240139).

Offense Variables

Scoring Offense Variables

Offense variables account for the specific circumstances surrounding an offense – the offense characteristics. OV's are intended to reflect and quantify the aggravating or mitigating factors unique to each offense. To score OV's, as with PRV's, determine which of the statements apply to the circumstances of the sentencing offense and score the one with the highest number of points. The total of all OV's is the OV total, represented by the vertical axis of a sentencing grid.

Unless otherwise indicated, conduct specific to one offense may be used to score the guidelines for a separate but contemporaneous offense even if the conduct was not necessary to commission of the separate offense. Similarly, unless otherwise indicated (in OV 3, for example), conduct involved in the sentencing offense may be scored under the guidelines variables even when the conduct is an element of the offense (necessary to its commission). *People v Gibson*, 219 Mich App 530, 534 (1996) (points for

causing injury to the victim were properly scored when the victim's injury formed the basis of the offender's CSC conviction). See also *People v Cotton*, 209 Mich App 82, 84 (1995) (CSC-I based on the victim's age and scoring OV for exploitation of victim due to age was permissible), and *People v Nantelle*, 215 Mich App 77, 84 (1996) (same result where age of the victim and the offender's position of authority were elements of CSC-II and were scored under OV addressing exploitation of a victim).

Some conduct-specific variables may not be scored for all contemporaneous offenses. For example, OV 5 is limited to very specific homicide-related charges and may not be scored for a contemporaneous arson conviction. *People v Strouse*, unpublished opinion per curiam of the Court of Appeals, issued February 4, 2003 (Docket No. 234034).

OV 1—Aggravated use of a weapon (MCL 777.31)

Note: OV 1 is scored for all felony offenses to which the sentencing guidelines apply.

General rules:

- “victim” is each person in danger of injury or loss of life.
- when case involves multiple offenders and one offender is assigned points for OV 1, all offenders must be assessed the same number of points.
- 5 points for displaying/implying a weapon cannot be scored when sentencing offense is felonious assault (MCL 750.82) or armed robbery (MCL 750.529).
- 5 points when offender used an object to suggest a weapon.
- 5 points when offender used chemical irritant, smoke device, or imitation harmful substance or device.

Specific definitions for scoring OV 1:

- when offenses involve incendiary devices and harmful chemical, biological, and radioactive substances, devices, materials, or irritants, see MCL 750.200h.

The multiple offender provision in OVs 1 and 3 requires that the score assessed the first offender sentenced for the crime, if uncontested, is the score that must be assessed all offenders involved in the offense. *People v Morson*, 471 Mich 248, 262 (2004). The first offender should be assessed the highest number of points appropriate to the offense and, unless some objection is raised to the scores calculated for the first offender, the plain language of the multiple offender provision requires that all offenders receive the same number of points given to the first offender for that variable.

The multiple offender provision presumes that the score given the first offender will be accurate before being assessed against other offenders involved in the offense. Where the first offender's score is inaccurate, the second offender's variable should be scored correctly even if the score differs from that of the first offender. *People v Libbett*, 251 Mich App 353, 366 (2002). In *Libbett*, the Court did not require that an involved party raise the objection. **Note:** After *Morson*, however, it appears that some challenge must be made to the accuracy of the score received by the first offender.

Examples of weapons:

A glass mug qualifies as “any other type of weapon” when the defendant caused his wife's injuries and eventual death by striking her with a glass mug. *People v Lange*, 251 Mich App 247, 252-255 (2002). In general, any item used as a weapon may be considered a weapon for purposes of OV 1. See *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No.

238557) (a stick was “any other type of weapon” when the offender threw it at the victim and it struck the victim).

A brass statue and a shotgun are not “other cutting or stabbing weapon[s]” even though the items were used in a manner that caused the victim to bleed. *People v Wilson*, 252 Mich App 390, 394 (2002).

20 points are appropriate where a defendant exposed police officers to explosive devices, and where the officers and others were exposed “to various harmful chemical substances[.]” *People v Rutherford*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2005 (Docket No. 255454). The statute does not make an exception in its definition of “victim” for officers and other professionals whose jobs require the disposal of dangerous substances.

OV 2—Lethal potential of the weapon possessed or used (MCL 777.32)

Note: OV 2 is scored for felony crimes against a person, crimes against property, and crimes involving a controlled substance.

General rules:

- when case involves multiple offenders and one offender is assigned points for OV 2, all offenders must be assessed the same number of points.

Specific definitions for scoring OV 2:

- when offenses involve incendiary devices and harmful chemical, biological, and radioactive substances, devices, materials, or irritants, see MCL 750.200h.
- definitions for *fully automatic weapon*, *pistol*, *rifle*, or *shotgun*, and *incendiary device* are included in OV 2.

A metal pipe or bat is a potentially lethal weapon when used to strike a person in the head. *People v McCullen*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2005 (Docket No. 250000).

Testimony that the defendant’s weapon was “shorter than a normal size shotgun” is sufficient to support an OV 2 score for possession of “short-barreled rifle or a short-barreled shotgun.” *People v Brewer*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2004 (Docket No. 242764).

OV 3—Physical injury to a victim (MCL 777.33)

Note: OV 3 is scored for all felony offenses to which the sentencing guidelines apply.

General rules:

Points assessed depend on the severity of harm resulting from the offense and may be limited by the nature of the sentencing offense.

- when case involves multiple offenders and one offender is assigned points for OV 3, all offenders must be assessed the same number of points.
- 100 points must be scored if death results from the offense when homicide is not the sentencing offense.

- 50 points (35 points for offenses committed before September 30, 2003) must be scored if death results from an offense/attempted offense involving the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive if (1) the offender was under the influence of or visibly impaired by alcohol and/or drugs, or (2) the offender had an alcohol content specified in the statutory language describing OV 3, or (3) the offender had any amount of the controlled substances identified in OV 3 (schedule 1 controlled substance or cocaine-related substance—a schedule 2 drug) in his or her body.
- 5 points cannot be scored when bodily injury is an element of the sentencing offense (does not limit scoring more than 5 points if appropriate).
- *requiring medical treatment* refers to the need for medical attention not to whether a victim successfully obtained treatment.

Victim is **not** limited to victims injured in the **charged** offense. For purposes of scoring OV 3, a *victim* includes any person harmed as a result of the offender's conduct. *People v Albers*, 258 Mich App 578, 593 (2003) (25 points properly assessed against the offender for a child seriously injured in the fire even though the offender's sentencing offense was involuntary manslaughter and 100 points could not be assessed for the victim who was killed in the fire because involuntary manslaughter is a homicide offense).

Points under OV 3 are not limited to the ultimate result of the offender's conduct/victim's injury. *People v Houston*, 473 Mich 399 (2005) (25 points were appropriate when a victim was killed and sentencing offense was homicide). In *Houston*, because the sentencing offense was homicide, 100 points could not be scored. However, the Court noted that OV 3 required that the highest number of points applicable to a situation be assessed. In this case, the Court explained that an offender's OV 3 score was not limited to the "ultimate result" of the offender's criminal conduct. Where a victim's death cannot be scored, the victim's injury preceding death may form the basis of an OV 3 score. Because the victim in *Houston* first suffered a "life-threatening or incapacitating injury" before ultimately dying from the gunshot wound inflicted by the defendant, 25 points were appropriately scored against the offender under OV 3.

Points are appropriately scored for OV 3 only where there is record evidence of a victim's injury; a prosecutor's file notes do not constitute record evidence. *People v Endres*, 269 Mich App 414 (2006).

Pregnancy resulting from sexual assault constitutes bodily injury. *People v Cathey*, 261 Mich App 506, 513-514 (2004). (See also *People v Woods*, 204 Mich App 472, 474-475 (1994), a case decided under the judicial sentencing guidelines on which the *Cathey* Court relied.)

Bodily injury not requiring medical treatment includes homemade tattoos and bruising, irritation, and redness resulting from sexual assault. *People v Apgar*, 264 Mich App 321, 329 (2004). Points for injury not requiring medical treatment may also be based solely on a victim's testimony that the offender's conduct caused the victim pain. *People v Lancaster*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2004 (Docket No. 244818).

Without evidence that the person was infected with HIV, points cannot be scored for life-threatening injury when the offender with HIV has unprotected sex with an uninformed person. *People v Clayton*, unpublished opinion per curiam of the Court of Appeals, issued September 13, 2002 (Docket No. 230328) (the uninformed person's panicked response to the knowledge and repeated HIV tests as a result supported a score of 5 points under OV 4, however) .

That a life-threatening injury may ultimately heal when treated does not prevent scoring OV 3 at 25 points. *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2003 (Docket No. 230566).

OV 4—(Serious) Psychological injury to a victim (MCL 777.34)

Note: OV 4 is scored for all felony offenses to which the guidelines apply except crimes involving a controlled substance.

- points are scored when a victim’s serious psychological injury may require professional treatment—assessment of points does not require that a victim has sought treatment for the injury.

There must be some evidence of serious psychological injury requiring treatment – points assessed under OV 4 cannot be based on presumptive harm. *People v Hicks*, 259 Mich App 518, 535 (2003).

A victim’s testimony and/or impact statement about the harmful effects of the offender’s conduct is sufficient to establish serious psychological injury (victim stated she had nightmares, problems with her marriage, and problems at work since the assault and she planned to seek treatment). *People v Drohan*, 264 Mich App 77, 90 (2004), affirmed on other grounds 475 Mich 140 (2006).

Where videotaped evidence showed the victims behaving and/or speaking in a manner that indicated serious psychological injury, the trial court properly scored OV 4 at 10 points. *People v Wilkens*, 267 Mich App 728 (2005).

Evidence substantiating a victim’s psychological harm and receipt of professional treatment need not be introduced by the victim. *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 243961). 10 points were appropriate where the trial court was informed that the victim had undergone and would continue to undergo psychological counseling for the “tremendous amount of emotional pain and suffering” caused by the offender’s assault.

OV 5—(Serious) Psychological injury to a member of a victim’s family (MCL 777.35)

Note: OV 5 is scored only under very specific circumstances involving a crime against a person: when the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder.

- points are scored when a victim’s family member suffers serious psychological injury that may require professional treatment—assessment of points does not require that the family member has sought treatment for the injury.

Points may be appropriate under OV 5 even when the family members’ reaction to the death of a family member is typical (trouble sleeping, anxiety affecting physical health, fear, and devastation) and the effect on their lives is not debilitating. *People v Chancy*, unpublished opinion per curiam of the Court of Appeals, issued December 14, 2004 (Docket No. 249893).

The mother of a victim killed in a fire that burned over 45 percent of the victim's body "could have suffered the type of psychological injury that may require professional treatment." *People v Strouse*, unpublished opinion per curiam of the Court of Appeals, issued February 4, 2003 (Docket No. 234034).

Points were properly scored where the victim's young child would grow up without a mother and where the victim's grandparents and uncle made statements indicating a number of other "incomprehensible . . . concerns for the family" caused by the loss. *People v Laury*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2003 (Docket No. 238490).

OV 6—Intent to kill or injure another individual (MCL 777.36)

Note: OV 6 is scored only under very specific circumstances involving a crime against a person: when the sentencing offense is homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder.

- an offender's OV 6 score must be consistent with the jury's verdict. An OV 6 score may be inconsistent with a jury's verdict only when the sentencing court possesses information that was not available to the jury.
- 10 points must be scored if a killing is intentional according to the definition of second-degree murder or voluntary manslaughter but the killing took place in a combative situation or in response to the decedent's victimization of the offender.
- 10 points must be scored when offender had intent to injure or the killing took place in an extreme emotional state caused by adequate provocation and before a reasonable amount of time elapsed for the offender to cool down or there was gross negligence amounting to an unreasonable disregard for human life.

A defendant's uncorroborated self-serving hearsay is not an effective challenge to the defendant's OV 6 score when the score was consistent with the jury's verdict, and when the record evidence more than adequately supported the trial court's scoring decision. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No. 238557). In *Jones*, the defendant claimed OV 6 should have been scored at 10 points rather than 25 because the victim died after attempting to rob the defendant; however, the evidence showed that the victim was fleeing from the defendant when he was first struck and then beaten to death.

Where a defendant is convicted by jury of OUIL causing death, a maximum of 10 points may be scored against the defendant under the statutory requirements governing OV 6. *People v Stanko*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2004 (Docket No. 242876). Based on the record before the Court on appeal, and without evidence of malice rising to the level of intent required to prove second-degree murder, no more than 10 points could be assessed against the defendant for OV 6.

Note: Conduct scored under OV 6 precludes scoring 10 points against an offender under OV 17 (degree of negligence exhibited).

OV 7—Aggravated physical abuse (MCL 777.37)

Note: OV 7 is scored for crimes against a person only.

Each person placed in danger of injury or loss of life is a victim for purposes of scoring OV 7. Sadism is “conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender’s gratification.”

Statutory amendment:

Terrorism was eliminated from OV 7’s list of conduct meriting points (effective April 22, 2002). Although the word “terrorism” was deleted, the conduct previously defined as terrorism remains in OV 7’s statutory language as “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” (OV 20 now addresses terrorism as we know it today.) Notwithstanding the elimination of the term “terrorism” from the language of OV 7, the variable accounts for the exact same conduct to which “terrorism” then referred—in its present version, OV 7 addresses “sadism, torture, or excessive brutality, *or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.*” MCL 777.37(1)(a) (emphasis added).

“Conduct designed to substantially increase the fear and anxiety a victim suffers during the offense” requires more than threats and use of a weapon. *People v Hornsby*, 251 Mich App 462, 469 (2002). The defendant was properly assessed 50 points for OV 7 where the evidence established that he “did more than simply produce a weapon and demand money.”

50 points were properly scored against a defendant for the excessive brutality exhibited by the defendant during the assault of his wife. *People v Wilson*, 265 Mich App 386, 398 (2005). “The victim’s testimony detailed a brutal attack, which took place over several hours, involving being attacked by weapons and being kicked, punched, slapped, and choked numerous times, ending in injuries requiring treatment in a hospital.”

Assessment of points under OV 7 does not require that a victim be alive or conscious during the treatment scored by the variable. *People v Kegler*, 268 Mich App 187 (2005). Points are properly scored under OV 7 when a victim is treated with excessive brutality no matter how (or if) the victim subjectively experiences that treatment. Although OV 7 accounts for a victim’s treatment when the victim is conscious, its application is not limited to those criminal episodes where a victim’s consciousness is implicitly required (when points are assessed for conduct intended to increase a victim’s fear and anxiety, for example).

50 points were appropriate where “[t]he record indicate[d] that defendant repeatedly stomped on the victim’s face and chest after the victim was lying unconscious on the ground. Additionally, the victim was deprived of oxygen for a period of four to six minutes . . . and currently remains comatose with little or no chance of ever regaining consciousness.” *People v James*, 267 Mich App 675 (2005).

Actual physical abuse is not necessary to score a defendant’s conduct under OV 7. *People v Mattoon*, 271 Mich App 275 (2006). In *Mattoon*, the defendant was convicted of various crimes related to an episode in which he held his girlfriend at gunpoint for nine hours. Apparently, no actual physical abuse was involved in the incident. The *Mattoon* Court examined the plain language of MCL 777.37 (OV 7) and concluded that the Legislature did not intend that actual physical abuse be required to support an OV 7 score. According to the Court:

“While the label of OV 7 is ‘aggravated physical abuse,’ when the section is read as a whole, the Legislature does not require actual physical abuse in order for points to be assessed under this variable. Specifically, subsection (3) defines ‘sadism’ to mean ‘conduct’ that, among other things, subjects the victim to extreme or prolonged humiliation. While humiliation may have a physical component, there certainly does not have to be physical abuse in order to produce humiliation. Emotional or psychological abuse can certainly have that effect as well. If the Legislature intended to limit the applicability of OV 7 to cases where there is physical abuse, then instead of defining ‘sadism’ to be ‘conduct’ that produces pain or humiliation, it would have said ‘physical abuse’ that subjects the victim to pain or humiliation.” *Id.* at 277-278.

Reprehensible and cruel conduct not intended to cause a victim additional fear or anxiety should not be scored under OV 7 (OV 2 at the time). *People v Dilling*, 222 Mich App 44, 55 (1997). According to the Court, the defendant in *Dilling* “did not care one way or another about the girl’s feelings”—the conduct was merely the defendant’s method of moving the girl from one room to the other. *Dilling, supra* at 55.

OV 2 under the judicial guidelines was properly scored where a group of individuals first threatened to shoot the victim and then displayed several bullets and a cigarette lighter fashioned to look like a handgun. *People v Kreger*, 214 Mich App 549, 552 (1995). Said the *Kreger* Court:

“While defendant argues that the victims were not ‘terrorized,’ OV 2 is properly scored as twenty-five where conduct *designed* to substantially increase fear and anxiety exists. It does not appear necessary that the victims actually be terror-stricken.” *Kreger, supra* at 552 (emphasis added).

50 points for “terrorism” were appropriate where the defendant took the victim’s identification as security for her silence about the robbery, implying that he knew who she was and where she lived and might exact revenge if she reported the crime. *People v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued May 25, 2004 (Docket No. 246263) (offense occurred before the adoption of OV 20, when “terrorism” was contained in OV 7).

OV 8—Victim asportation or captivity (MCL 777.38)

Note: OV 8 is scored only for crimes against a person.

- each person in danger of injury or loss of life is a victim for purposes of scoring OV 8.
- if the sentencing offense is kidnapping, 0 points must be scored.

In general, points may be scored under OV 8 whenever an offender moves a victim to a place of greater danger. For example, OV 8 (OV 5 at the time) was properly scored in a case where the offender separated a mother from her children and moved them to a room where she could not see them or what was happening to them. *People v Hack*, 219 Mich App 299 (1996).

Asportation need not be forcible to merit points under OV 8. “While asportation is an element of forcible kidnapping, there is no requirement that the movement itself be forcible. Rather, the only requirement for establishing asportation is that the movement not be incidental to committing an underlying offense.” *People v Spanke*, 254 Mich App 642, 647 (2003). In *Spanke*, no force was employed to move the victims to the defendant’s home—in fact, there was evidence that the victims may have voluntarily accompanied the defendant to his home. The *Spanke* Court stated that “the crimes

could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others”; thus, the movement was more than merely incidental to the commission of the crime.

Points were appropriate when victim was transported to an unfamiliar house where the criminal conduct occurred even though no force was used in transporting her there. *People v Apgar*, 264 Mich App 321, 330 (2004).

Points are appropriate under OV 8 where evidence established that the defendant and the victim were alone in the car that the defendant had driven “to what was described as a two-track road in an isolated area near a river,” and the defendant parked the car so it faced away from the road. *People v Phillips*, 251 Mich App 100, 108 (2002).

Points are appropriate when, even though the victim had been to the defendant’s house on other occasions, the defendant was the individual who transported the victim to the defendant’s house at the time the sexual offenses occurred. *People v Cox*, 268 Mich App 440 (2005).

OV 9—Number of victims (MCL 777.39)

(as amended by 2006 PA 548, effective March 30, 2007)

Note: OV 9 is scored for all felony offenses to which the guidelines apply except crimes involving a controlled substance.

Each person in danger of injury or loss of life is a victim for purposes of OV 9. 100 points are appropriately scored only in homicide cases.

As amended, MCL 777.39 extends the scope of OV 9 to include the danger of property loss when considering whether an individual is a victim of the offender’s conduct.

Point allocations differentiate between physical danger and danger of property loss when counting the number of victims. 25 points are appropriate when 10 or more persons are placed in danger of physical injury/death or when 20 or more persons are placed in danger of property loss. 10 points are appropriate when 2 to 9 victims are placed in danger of physical injury/death or when 4 to 19 persons are placed in danger of property loss. 0 points are scored when less than 2 persons were in danger of physical injury/death or when less than 4 persons were in danger of property loss.

10 points were appropriate where the defendant shot a bystander who attempted to aid the armed robbery victim. *People v Morson*, 471 Mich 248, 261-262 (2004).

10 points were appropriate where the decedent, her fiancé, and her child were in the car with her when the defendant shot through the windshield and killed the decedent. *People v Kimble*, 252 Mich App 269, 274 (2002), *aff’d* on other grounds 470 Mich 305 (2004).

10 points were appropriate where videotaped evidence showed two victims actually being harmed or being placed in danger of injury as a result of the defendant’s conduct. *People v Wilkens*, 267 Mich App 728 (2005).

The three individuals who occupied a vehicle passed by the defendant's car before it struck the decedent were properly counted as victims for purposes of scoring OV 9. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2003 (Docket No. 229137).

OV 9 must not be construed so broadly that the mere possibility that other individuals might stumble into a dangerous situation qualifies those individuals as victims under this variable. *People v Shulick*, unpublished opinion per curiam of the Court of Appeals, issued November 4, 2003 (Docket No. 240343).

The number of victims properly included the victim's wife and children who, although they occupied a different room of the house than did the defendant and the victim, were "placed in danger of injury or loss of life" when the defendant fired multiple shots in the victim's home. *People v Williams*, unpublished opinion per curiam of the Court of Appeals, decided May 20, 2003 (Docket No. 230566).

OV 10—Exploitation of a vulnerable victim (MCL 777.40)

Note: OV 10 is scored for all felony offenses to which the guidelines apply except crimes involving a controlled substance.

- points should not be scored under OV 10 simply because one or more of the factors addressed by the variable are present in the circumstances surrounding the sentencing offense.
- predatory conduct is an offender's preoffense conduct directed at a victim for the primary purpose of victimization.
- to exploit a victim is to manipulate a victim for the offender's selfish or unethical purposes.
- a victim's vulnerability is the victim's readily apparent susceptibility to injury, physical restraint, persuasion, or temptation.
- abuse of authority status means the offender used a victim's fear of or deference to an authority figure to exploit the victim (e.g. teacher, parent, physician, etc.).

OV 7 (OV 10 under the statutory guidelines) differentiates between an offender's exploitation of a victim due to a difference in size or strength and exploitation of a victim based on agedness. *People v Piotrowski*, 211 Mich App 527, 531 (1995). In *Piotrowski*, where the victim was an elderly woman, the defendant argued that her treatment of the victim was not the result of age-based exploitation; instead, according to the defendant, she would have subjected the victim to the same treatment regardless of the victim's age. *Piotrowski, supra* at 531. The Court disagreed and emphasized the point values corresponding to an offender's exploitation due to strength or size (5 points) and an offender's exploitation due to age (15 points).

Example: Abuse of authority status

Even where no evidence was presented to indicate that the defendant manipulated the victim or exploited the victim due to his status, 10 points were correctly assessed against the 67-year-old defendant, who was in the process of adopting the 14-year-old victim at the time he sexually assaulted her. *People v Phillips*, 251 Mich App 100, 109 (2002).

Note: a "domestic relationship" for purposes of OV 10 requires more than just "some kind of relationship"-- In the context of scoring OV 10, the defendant and the victim must have a "familial or cohabitating relationship." *People v Counts*, unpublished opinion per curiam of the Court of Appeals, decided May 20, 2004 (Docket No. 246717). If *any* relationship could qualify under OV 10, the

Legislature need not have specified “domestic.” Further, OV 10 requires not only the existence of the domestic relationship— points are appropriate only when the defendant *exploits* that relationship.

10 points are proper only where the defendant has exploited a *victim’s* vulnerability; that is, when the defendant “exploit[s] a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status.” 10 points were not proper when the score was based on the fact that the defendant’s two children were passengers in the defendant’s car when she drove through a flashing red light and killed the driver of another vehicle. *People v Hindman*, 472 Mich 875 (2005), reversing the unpublished opinion per curiam of the Court of Appeals, issued January 22, 2004 (Docket No. 244904). It was error for the trial court to assess points under OV 10, “not on the basis of having exploited the second-degree murder victim, but on the basis of having exploited her own children who were merely passengers in her car and not the victims of the criminal offense being scored.”

Example: Vulnerability of the victim’s age

Points may be appropriate based solely on the victims’ age without direct evidence of the victims’ vulnerability due to age or that defendant’s conduct was an exploitation of the victims’ age. *People v Harmon*, 248 Mich App 522, 531 (2001). The defendant relied on the statutory language contained in MCL 777.40(2), which provides that “[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.” *Harmon, supra* at 531. Contrary to the defendant’s argument that the young girls participated in his photography sessions without coercive or exploitive conduct on his part, the evidence established that the defendant manipulated the victims based on their age, their financial need, and their aspiration to become models. *Id.* at 531– 532.

A five-year age difference between a defendant and a complainant may justify a score of ten points for OV 10. From the age difference, a trial court “could determine that defendant exploited the victim’s youth[.]” *People v Johnson*, 474 Mich 96 (2006)

Points were appropriate under OV 10 where the “defendant ‘exploited’ the victim’s youth by manipulating her with clothes and alcohol in exchange for [her participation in] making the sexually abusive videotape.” *People v Wilkens*, 267 Mich App 728 (2005).

Example: Predatory conduct / victim was asleep

The trial court properly scored 15 points against the defendant for predatory conduct under OV 10 where the evidence established that the defendant and his accomplices drove around looking for a car from which they could steal a set of expensive wheel rims, spotted the victim’s car and its valuable wheel rims, followed the victim’s car to the victim’s home, watched the victim pull her car into the driveway, shot the victim, and stole her car. *People v Kimble*, 252 Mich App 269, 274-275 (2002).

The timing and location of an offense is evidence that the defendant watched and waited for an opportunity to commit the criminal act, and watching and waiting for an opportunity to commit a crime is “predatory conduct” for which the defendant was appropriately assessed 15 points under OV 10. *People v Witherspoon (After Remand)*, 257 Mich App 329, 336 (2003). In *Witherspoon*, the third-grade victim testified that the defendant assaulted her when she was alone in the basement folding clothes. Relying on *Kimble, supra*, the Court noted that the defendant’s timing (when the victim was alone) and his choice of location (an isolated room of the house, the basement) was sufficient to establish predatory conduct similar to the defendant’s conduct in *Kimble*.

Points were properly scored for predatory or preoffense conduct when the defendant engaged in sexual conduct with “a seventeen-year-old mentally incapable victim.” In addition to the questions concerning the victim’s mental status, evidence established that the defendant visited the victim at his foster home, the victim had been to the defendant’s home on several occasions and had viewed pornographic material there, and the “defendant admitted to harboring the victim as a runaway from a foster home.” *People v Cox*, 268 Mich App 440 (2005).

15 points for predatory conduct were appropriate where evidence showed that the victim confided in the defendant and the defendant took advantage of her vulnerability by approaching her on numerous occasions and waiting for her in a parking structure before assaulting her. *People v Drohan*, 264 Mich App 77, 90-91 (2004), affirmed on other grounds 475 Mich 140 (2006).

Must a defendant’s preoffense conduct be focused on a specific individual to merit points under OV 10? 15 points were not appropriate where the defendant’s pre-offense conduct was not directed at a specific victim and no evidence supported the idea that the defendant followed or waited for the victim. *People v Parnell*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 2004 (Docket No. 248236). **But see** *People v Hawkins*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2002 (Docket No. 226718), where the Court determined that predatory conduct need not be directed exclusively at the victim involved in the sentencing offense. The language governing OV 10 “does not state that the pre-offense conduct be directed at a specific victim chosen before the offense occurs.”

OV 11—Criminal sexual penetration (MCL 777.41)

Note: OV 11 is scored for crimes against a person only.

- all sexual penetrations arising out of the sentencing offense (except the one penetration on which a first- or third-degree CSC offense is based) must be counted when scoring OV 11.
- multiple sexual penetrations of the victim by the offender occurring beyond the sentencing offense may be scored in OVs 12 or 13.
- any conduct scored under OV 11 cannot be scored under OV 12.
- conduct scored under OV 11 may be scored under OV 13 only if the conduct is related to the offender’s membership in an organized criminal group.

Sexual penetrations that form the basis of a conviction separate from the sentencing offense are not precluded from consideration under OV 11. *People v McLaughlin*, 258 Mich App 635, 676 (2003).

OV 11 was properly scored at 25 points in Count 1 “because defendant was charged with only one penetration, yet he penetrated the female victim more than once during the making of the videotape” (evidence showed that the defendant penetrated the victim with his mouth and with a sex toy). *People v Wilkens*, 267 Mich App 728 (2005). OV 11 was also properly scored at 25 points in Count 2 where the evidence established that, in addition to at least one other penetration, the defendant aided and abetted the male victim’s penetration of the female victim.

An OV 11 score of 25 points for one penetration was appropriate even when the defendant was convicted of two counts of CSC-1 for the two penetrations arising from the sentencing offense. According to the Court, “the proper interpretation of OV 11 requires the trial court to exclude the one penetration forming the basis of the offense when the sentencing offense itself is first-degree or third-degree CSC.” *People v Cox*, 268 Mich App 440 (2005).

In *People v Johnson*, 474 Mich 96 (2006), the Michigan Supreme Court further defined OV 11 as applied to cases in which a defendant is convicted of more than one count of CSC-1. In *Johnson*, the trial court scored OV 11 at 25 points because the defendant had twice penetrated the victim. Like the defendant in *Cox*, the defendant in *Johnson* was charged with and convicted of CSC-1 for each penetration. In *Cox*, 25 points were appropriately scored because the two penetrations/convictions arose from the same sentencing offense. In contrast to *Cox*, however, neither of the penetrations in *Johnson* arose from the same sentencing offense. In *Johnson*, the penetrations occurred on different dates. In the absence of any evidence that the defendant's conduct on one date arose from his conduct on the other date, the two penetrations did not arise from either of the two CSC-1 offenses for which the defendant was sentenced. Therefore, because the two penetrations in *Johnson* did not arise from the sentencing offense, OV 11 should have been scored at 0 points.

OV 12—Contemporaneous felonious criminal acts (MCL 777.42)

Note: OV 12 is scored for all felony offenses to which the sentencing guidelines apply.

- a felonious criminal act is contemporaneous if both of the following circumstances exist: (1) the criminal act occurred within 24 hours of the sentencing offense, and (2) the criminal act has not and will not result in a separate conviction.
- conduct scored in OV 11 (criminal sexual penetrations) must not be scored under this variable.
- possession of a firearm during the commission of a felony (MCL 750.227b) should not be counted when scoring OV 12.

Even when the crimes a defendant conspired to commit are characterized as crimes against a person, conspiracy is a crime against public safety. Therefore, charges or convictions for conspiracy to commit a crime against a person may not be counted as crimes against a person when scoring OV 12. *People v Miller*, unpublished opinion per curiam of the Court of Appeals, October 28, 2003 (Docket No. 240613). Conspiracy to commit carjacking and conspiracy to commit armed robbery are crimes against public safety and cannot be counted when numbering an offender's contemporaneous felonious acts under OV 12.

When determining the proper score for OV 12, a trial court may consider a contemporaneous felonious criminal act with which the defendant was charged at trial, even though the jury acquitted the defendant of that charge. *People v Cornett*, unpublished opinion per curiam of the Court of Appeals, issued April 3, 2003 (Docket No. 233958). See also *People v Minner*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2002 (Docket No. 227956) (where the defendant was convicted of one count of first-degree CSC and acquitted of five other felony charges, sufficient evidence may support use of those five charges in scoring the defendant's OVs).

OV 13—Continuing pattern of criminal behavior (MCL 777.43)

Note: OV 13 is scored for all felony offenses to which the statutory guidelines apply.

- all crimes within a period of 5 years, including the sentencing offense, must be counted without regard to whether the offense resulted in a conviction.
- conduct scored under OVs 11 or 12 should not be considered unless the offense was related to the offender's membership in an organized criminal group.
- the existence of an organized criminal group may be inferred from the facts surrounding the sentencing offense. The group's existence is more important than the presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication demonstrated by the criminal group.
- 50 points are appropriate only if the sentencing offense is first-degree criminal sexual conduct.

Statutory amendment:

Only one controlled substance offense arising from the criminal episode for which the offender is being sentenced may be counted when scoring OV 13 (effective March 1, 2003). Only one crime involving the same controlled substance may be counted under this variable (effective March 1, 2003).

The five-year period to which OV 13 refers must include the sentencing offense. OV 13 assesses points when a sentencing offense is part of a pattern of felonious activity. According to OV 13, a pattern consists of three or more crimes committed in a five-year period "including the sentencing offense." *People v Francisco*, 474 Mich 82 (2006).

OV 13 was properly scored at 25 points where the defendant was convicted of two felony offenses against a person and had two first-degree CSC charges pending at the time he was sentenced. *People v Wilkens*, 267 Mich App 728 (2005).

OV 13 was properly scored at 25 points where the evidence established that the defendant was involved in three home invasions from which the sentencing offense stemmed, even though the defendant was not convicted of home invasion. *People v Clark*, unpublished opinion per curiam of the Court of Appeals, issued October 2, 2003 (Docket No. 240139). For purposes of OV 13, an offender's "continuing pattern of criminal behavior" includes the offender's involvement in the home invasions from which the offender acquired the stolen property on which the sentencing offense was based. The instructions for OV 13 unambiguously mandate the inclusion of all crimes within a five-year period, regardless of whether convictions resulted.

OV 13's reference to an offender's "continuing pattern of criminal behavior" does not contemplate situations in which an offender's multiple concurrent convictions arise from a single incident, as opposed to a *series* of incidents that comprise a larger criminal transaction. *People v Smith*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2003 (Docket No. 229137). In *Smith*, the defendant's convictions arose from the consequences of his operation of a motor vehicle while under the influence of alcohol. The Court discussed the decision reached in *People v Harmon*, 248 Mich App 522, 532 (2001), where an offender's OV 13 score was properly set at 25 points for four concurrent convictions arising from the defendant's conduct on a single day. But the *Smith* Court distinguished the circumstances present before it from the circumstances in *Harmon*. According to the *Smith* Court, although the defendant's convictions in *Harmon* arose from conduct that occurred on a single day, the defendant's conduct was easily divisible into four distinct actions—two photographs each of two different minor females—which established a "continuing pattern of criminal behavior" under OV 13.

According to the *Smith* Court, OV 13 “evinces an intention that it is repeated felonious conduct that should be considered in scoring this offense variable.” Because the defendant in *Smith* was convicted of multiple concurrent offenses, but each offense largely overlapped the others and was not readily identifiable as a discrete part of the whole pattern, points were not appropriate under OV 13.

10 points were proper under OV 13 where evidence established that the defendant and at least two other individuals collaborated to manufacture methamphetamine at several different locations on at least ten occasions. *People v Streeter*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2004 (Docket No. 246479).

Under the judicial guidelines (OV 9), a trial court could not assess points against a defendant for the defendant’s implied participation in a larger criminal organization involved in drug dealing—“defendant must have gotten his drugs from a supplier.” *People v Reddish*, 181 Mich App 625, 629 (1989).

OV 14—Offender’s role (MCL 777.44)

Note: OV 14 is scored for all felony offenses to which the statutory guidelines apply.

- the entire criminal transaction in which the sentencing offense occurred should be considered when determining the offender’s role in the offense.
- where 3 or more offenders are involved in the sentencing offense, more than one offender may be considered a leader.

The entire criminal episode forms the basis for determining whether a defendant was a leader in a multiple offender situation. 10 points were appropriate under OV 14 where, although the defendant did not drive the automobile in which the offenders rode, the defendant was the oldest among the group of offenders involved in the sexual assault, he was the first to make sexual contact with the victim and had the most sexual contact with her, and his was the only DNA that matched the semen in the victim’s vaginal area. *People v Apgar*, 264 Mich App 321, 330 (2004).

An undercover police informant acting as a buyer in purchasing cocaine from the defendant is not an “offender” for purposes of OV 14. *People v Rosenberg*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2005 (Docket No. 251930). A police informant acting in concert with law enforcement is not “committing a crime” when the informant’s conduct is authorized by the police. Where the defendant was the only other person involved in the controlled buy, the circumstances do not constitute a “multiple offender situation” as intended by OV 14.

OV 14 is properly scored at 10 points when the defendant is one of two offenders (in a group of three offenders) taking an active role in the commission of the crime and neither one of the two primary participants establishes himself as the leader. *People v Brewer*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2004 (Docket No. 242764). In *Brewer*, 10 points were appropriate where the defendant was one of two men with guns who demanded money from the hotel clerk and tied him up in the hotel manager’s office, and where testimony indicated that the third participant’s purpose in the criminal endeavor was unclear to the victim who suggested that the third person was “maybe a watch out.”

The defendant was the leader for purposes of OV 14 in a group’s attempt to rob the victim where the defendant “took initiative” in the robbery attempt and “was the first person to throw a punch.” *People v*

Scott, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2004 (Docket No. 243418).

OV 15—Aggravated controlled substance offenses (MCL 777.45)

Note: OV 15 is scored only for crimes involving a controlled substance.

- for purposes of scoring OV 15, delivery is the actual or constructive transfer of a controlled substance from one person to another person without regard to remuneration.
- trafficking is the sale or delivery of actual or counterfeit controlled substances on a continuing basis to another person or persons for further distribution.
- a minor is an individual 17 years of age or less.

Statutory amendment:

Effective March 1, 2003, the statute governing point allocations for OV 15 was amended. In several statements describing the number of points appropriate to a situation, the point allocations differ for crimes committed before March 1, 2003, and those committed on or after March 1, 2003.

For purposes of scoring the guidelines, it appears that a person may “deliver” a controlled substance by injecting the substance into another person. *People v Havens*, 268 Mich App 15 (2005), citing *People v Schultz*, 246 Mich App 695, 701-709 (2001), as support for the conclusion that a person can deliver a controlled substance by injecting it into another person.

5 points were proper where the defendant was convicted of possession with intent to deliver less than 50 grams of cocaine. *People v Scott*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2004 (Docket No. 248764). The trial court scored OV 15 at 5 points because the amount of cocaine and its packaging (pieces of crack cocaine were individually wrapped) indicated that the defendant intended to sell or deliver a controlled substance having value or under circumstances that indicated he was involved in trafficking.

OV 16—Property obtained, damaged, lost, or destroyed (MCL 777.46)

Note: OV 16 is scored for all felony offenses to which the statutory guidelines apply except those involving a controlled substance. When the offense is a crime against a person, OV 16 is scored only for a violation or attempted violation of MCL 750.110a (home invasion).

- in cases involving multiple offenders or multiple victims, the appropriate point total may be determined by aggregating the value of property involved in the offense, including property involved in uncharged offenses or property involved in charges dismissed under a plea agreement.
- money and/or property involved in admitted but uncharged offenses or charges dismissed by plea agreement may be considered when scoring OV 16.
- where the property involved was unlawfully obtained, lost to the lawful owner, or destroyed, use the value of the property when scoring this variable.
- where the property involved was damaged, use the monetary amount necessary to restore the property to its pre-offense condition when scoring OV 16.

Where the sentencing offense was armed robbery, MCL 750.529, OV 16 should not have been scored because armed robbery is a crime against a person, and for crimes against a person, OV 16 is scored only when the violation or attempted violation involves MCL 750.110a (home invasion). *People v*

Miller, unpublished opinion per curiam of the Court of Appeals, issued October 28, 2003 (Docket No. 240613).

A family's attachment to the family pet is the sort of intangible value of property contemplated by OV 16's point assignment for damage or destruction to property with "significant sentimental value" to its victims. *People v Kruithoff*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2003 (Docket No. 242739).

The monetary amounts reflected in the statutory language governing OV 16 do not require submission of exacting or itemized proof of the property's value. See *People v Rosario*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2003 (Docket No. 236965) (where testimony established that a door had been broken off its hinges, a mattress was ruined, and a phone line had been pulled off the wall, the Court of Appeals found that there was sufficient evidence showing that the property damage met the minimum amount of \$200 for purposes of scoring OV 16).

OV 17—Degree of negligence exhibited (MCL 777.47)

Note: OV 17 is scored only in very specific situations: when the offense is a crime against a person and the crime involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.

- if points have been assessed against the offender in OV 6 (intent to kill or injure another individual), 10 points cannot be scored under OV 17.

Unlike OV 6 (intent to kill or injure another individual), OV 17 is not required to be consistent with a jury's verdict, but where an offender is assessed points under OV 6 and those points are consistent with the jury's verdict, 10 points may not be assessed against the offender under OV 17. *People v Stanko*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2004 (Docket No. 242876).

OV 18—Operator ability affected by alcohol or drugs (MCL 777.48)

Note: OV 18 is scored only in very specific situations: when the offense is a crime against a person and the crime involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive and the offense involved alcohol and/or drugs.

- for purposes of OV 18, any bodily alcohol content is either of the following: (1) an alcohol content of 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or (2) any presence of alcohol within a person's body from the consumption of alcohol except for alcohol consumption as part of a generally recognized religious service or ceremony.
- definitions of "aircraft," "ORV," "snowmobile," "vehicle," and "vessel," are referenced in MCL 771.1.

Statutory amendment:

The descriptive statements accompanying the point allocations in OV 18 were amended effective September 30, 2003. In some cases, a different number of points are assessed for crimes committed before September 30, 2003, and those committed on or after September 30, 2003.

Beginning October 1, 2013, the values in OV 18 change to an alcohol content of 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

OV 19—Threat to the security of a penal institution or court or interference with the administration of justice or emergency services (MCL 777.49)

Note: OV 19 is scored for all felony offenses to which the guidelines apply.

- conduct properly considered under OV 19 includes force or threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in interference with the administration of justice or the rendering of emergency services.
- conduct not involving force or threat of force may be scored under OV 19 when the conduct was an attempt to interfere with or caused interference with the administration of justice.
- conduct that threatens the security of a penal institution or of a court is also assessed points under this variable.

A defendant's conduct is properly scored under OV 19 where the defendant threatens to kill a victim of the crime committed. *People v Endres*, 269 Mich App 414 (2006). Without regard to a defendant's intention when the threat was issued, 15 points are appropriate because the "threats resulted in the interference with the administration of justice, either by preventing the victim from coming forward sooner or impacting his testimony against defendant."

A defendant's conduct before criminal charges are filed against him or her may form the basis of interfering or attempting to interfere with the administration of justice as contemplated by OV 19; the conduct constituting interference with the administration of justice under OV 19 includes giving a police officer a false name when asked for identification. The phrase 'administration of justice' "encompasses more than just the actual judicial process." See *People v Barbee*, 470 Mich 283, 284, 288 (2004) (the defendant gave a false name to a police officer who had pulled over the defendant's car for crossing the fog line). See also *People v Cook*, 254 Mich App 635 (2003) (10 points were proper under OV 19 where police pursued the defendant by car and the defendant attempted to avoid police contact).

25 points were proper for threatening court security where the defendant—who was accused of an assaultive crime—ran from the courtroom and escaped custody. *People v Peoples*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 2004 (Docket No. 248155).

OV 19 was properly scored where the defendant absconded and fled the jurisdiction during his trial. *People v Vallance*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2003 (Docket No. 242163). According to the *Vallance* Court, the defendant's conduct was "precisely the type of 'evasive and noncooperative behavior' that OV 19 was designed to address."

10 points are appropriate when a defendant hides evidence from police officers after the evidence was discovered on the defendant's person in a search incident to arrest. *People v Scott*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2004 (Docket No. 248764).

OV 19 is properly scored at 10 points where an offender "goes beyond merely lying to the police about being guilty, but affirmatively interfer[es] with the administration of justice by inventing a crime where none existed, and falsely reporting that non-existent crime to the police." *People v Morgan*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2003 (Docket No. 242731). In *Morgan*, the defendant assaulted and seriously injured his wife. While driving her to the hospital, the defendant told her to claim she had been jumped, beaten, and robbed, and at the hospital, the defendant himself reported the "story" to the investigating police officer.

OV 20—Terrorism (MCL 777.49a)

Note: OV 20 is scored for all felony offenses to which the statutory guidelines apply.

OV 20 was effective April 22, 2002. Before this time, “terrorism” was measured by OV 7.

The terms used in the language describing OV 20 are defined in MCL 750.543b.

- an act of terrorism is a “willful and deliberate act” that satisfies all three of the following criteria: (1) the act would be a violent felony in Michigan, whether or not the act was committed in Michigan; (2) the person committing the act knows or has reason to know that the act is dangerous to human life; and (3) the act is intended to intimidate or coerce a civilian population or influence or affect, by intimidation or coercion, the conduct of government or a unit of government. MCL 750.543b(a)(i)-(iii).
- a terrorist is any person who engages or is about to engage in an act of terrorism. MCL 750.543b(g).
- harmful biological, chemical, and radioactive substances, devices, and materials are defined in detail in MCL 750.200h.
- an incendiary device includes gasoline or any other flammable substance, a blowtorch, fire bomb, Molotov cocktail, or other similar device.